No. 2689

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONERATO CHAPPI, owner of the Gasoline Boat "NOE G",
Appellant,

vs.

M. COSTA, JOE H. COSTA and JOHN SILVIA,
Respondents.

Respondents' Points and Authorities

Upon Appeal from the United States District Court for the Southern District of California.

Southern Division

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F. D. Monckton,
Clerk

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...., *Clerk*

By ...., *Deputy*

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Appellees.

Appellees' Points and Authorities

Appellant herein bases his appeal entirely on the proposition that the evidence does not support paragraphs four and five of the findings, which are as follows:

> "Paragraph 4. That at the time of said collision and for some time prior thereto, the said boats had been running in a fog; that at the time of the collision and for some time prior thereto, the gasoline power boat L'Etruria had not been blowing her fog horn; that the lookout on the L'Etruria sighted the "Noe G" when the boats were from forty to fifty feet apart; that the said "Noe G" was dead ahead of and on a course bearing directly toward the L'Etruria; that at the time the lookout on the

L'Etruria sighted the "Noe G" he immediately ported his helm and went to starboard.

"Paragraph 5. That the "Noe G" did not sight the L'Etruria until she was within ten to fifteen feet of the said L'Etruria; that had the lookout been properly manned and attending to his duties he could have made out the L'Etruria when she was at least forty to fifty feet distant; that the said "Noe G" held her course and did not go to starboard after sighting the L'Etruria striking the L'Etruria on her port bow just forward of the chain plates, making a large hole in said L'Etruria through which the sea entered so rapidly that within a few minutes after the collision the said L'Etruria sank, together with her engines, tackle, apparel, furniture and provisions; that the gasoline power boat L'Etruria, her engines, tackle, apparel, furniture and provisions were lost; that the said libellants were damaged through the loss of the L'Etruria, her engines, tackle, apparel, furniture and provisions, in the sum of $2500; that the "Noe G" was not damaged."

Appellant also objects to the conclusions of law and also questions whether or not they are properly conclusions of law. For the purpose of this argument respondents fail to see any necessity for going into that question. The conclusions of law objected to by appellants are as follows:

"Paragraph 2. That the "Noe G" was negligent in not keeping a proper and sufficient lookout and

in not going to starboard when she sighted the L'Etruria."

Appellants' appeal being based solely on the question of whether or not the evidence justified the findings, respondents respectfully submit that the evidence did support said findings. In support thereof, we call the Court's attention to the evidence of Oscar Peuna, Captain of the "Noe G", page 20, line 26:

"Q. How far away was the L'Etruria when you first saw it?

"A. About ten or fifteen feet.

"*The Court*: Ten or fifteen feet?

"A. When he saw it first?

"*The Court*: Ten or fifteen feet apart?

"A. Yes sir."

Appellants claim that there was no evidence to support the findings, we respectfully submit is answered by the testimony of their own witness, the Captain of the "Noe G."

We believe the rule is well settled in Appellate Courts that the findings of the trial judge will not be disturbed upon mere questions of fact unless there is found to be a decided preponderance of evidence to the contrary.

The Fin MacCool, 147 Fed., 123;

The Ludwig Holberg, 43 Fed., 117;

The City of Cleveland, 90 Fed., 431;

The Maggie P., 25 Fed., 202;

The Albany, 48 Fed., 565,

and many other cases.

That the Court below was justified in finding that the evidence given by Captain Peuna was correct and that

that of the other members of the crew should be discredited, we respectfully submit is borne out even by the evidence as shown by the transcript and, in addition to this evidence, the Court below, of course, had an opportunity to observe the witnesses on the stand, their manner, attitude, etc. In support of our contention that the evidence of Dosa Peopela, Antonio Levero, and Noe Chappi is not entitled to any consideration, we call the Court's attention to the fact that everyone of these men testified to having seen practically the same thing at the same time, regardless of where the individual might have been at the time of the accident, and the further fact that they all claim to have been in a position to see what was done.

The testitmony of Dosa Peopela in that regard is as follows (page 31, line6):

> "Q. When did you first see the L'Etruria?
>
> "A. He says I was about forty feet when I saw it first and he hollered that there was a boat ahead of them and he told the other fellows to reverse the engine at full speed."

The testimony of Antonio Levera on that point was as follows (page 41, line 9):

> "Q. How far was the L'Etruria from the "Noe G" when you first saw it?
>
> "A. He said it was about forty feet."

The testimony of Noe Chappi (p. 50, line 1), is as follows:

> "Q. How far was the L'Etruria from the "Noe G" when you first saw it?
>
> "A. It was about from 30 to forty feet."

And on page 52, line 21,

"Q. Were you the engineer?

"A. Yes.

"Q. How long had you been down at the engine?

"A. He said it was about six or seven minutes. He said he went to oil up the engine."

Line 27,

"Q. How far is the engine from the door of the cabin?

"A. About two feet distant from the wheel to the engine.

"Q. How far would he have to go from the engine back to where he could get out of the cabin at the engine room?

"A. He says about three stairs from the engine room to the deck."

The further testimony of the three witnesses with regard to reversing the engine and backing the Noe G, that of Peopela, p. 34, line 2 is as follows:

"Q. What did you do when you saw the L'Etruria?

"A. He says I was hollering that a boat is ahead of us, to reverse the engine, and so they did. The other party on their boat saw they were going backwards and their boat came ahead and square on the bow without nobody was on the deck.

"*The Court*: Was your boat going backward when the collision occurred?

"A. Yes sir.

The Court: Do you mean that the engine was going backwards or the boat was going backwards?

"A. He says that the engine was turning backwards and also the boat was going backwards."

Same witness, page 35, line 4:

"*The Court*: How far would your ship move before you can stop it when it is going a mile an hour?

"A. It could stop right away."

On page 35, line 14,

"A. He says that when the boat was at low speed that he could stop right away.

"Q. Do you mean, then, he could reverse, he could stop immediately without moving forward at all?

"A. Yes sir."

And on page 35, line 28:

"Q. How far backwards did you go?

"A. It was about half a minute, the other boat came on top of it so fast.

"Q. How many feet backwards did you go?

"A. He says from about 20 to 30 feet.

"Q. Did it move backwards ?

"A. From about 20 to 30 feet."

And on line 7:

"Q. Ask him again and see if he got that right?

"A. Yes sir, he was going at high speed backwards."

The testimony of Levera, at p. 46, line 21, is as follows:

"Q. Ask him if he has got any idea of about how far they went?

"A. He said he was going so slow that he started right backwards, going backwards right away."

The testtimony of Noe Chappi, page 48, line 24 is as follows:

"Q. How fast was the Noe G travelling at the time he called out to you to reverse the engine?

"A. About three miles.

"Q. How far did the Noe G go after you reversed the engine and the boat stopped and started backwards?

"A. From 5 to 6 feet.

"Q. At the time the collision occurred was the Noe G going backwards or ahead?

"A. Going back."

The testimony of Harry Madruga, called on behalf of the libellants, with regard to the ability to reverse a boat of this size, was as follows (p. 69, line 16):

"Q. Are you acquainted with the Noe G?

"A. Yes sir.

Q. Will you state to the Court how far a boat of the size of the Noe G, with an engine like the Noe G has in it, would go before it could be stopped when she was reversed full speed back when she was travelling in the neighborhood of three miles an hour at the time she was reversed?

"A. I don't think it could be stopped in less than two boat lengths."

Further, on page 70, line 3:

"Q. How long would it take to get her started backwards?

"A. When a boat is running half speed you can't throw her wide open and run her full speed in a second. You have got to go down and reach a lever, speed her up and then throw her."

We respectfully submit that the evidence heretofore set out of these three witnesses is such as to cause a court naturally to discredit their testimony, which is, in effect, what the Court did in finding as it did. In the case of the *City of Augusta,* 80 Fed., 297, the Court said: "Where the judge below has recorded his impression that certain testimony given by witnesses in his presence was of doubtful value, his conclusions will be entitled to great weight." We respectfully submit that this is what the Court did in finding as he did in this case.

We wish to further call the Court's attention to the fact that not only is there a conflict of testimony, but that the conflict is between appellants' own witnesses, and that the Court, in its findings as to the position of the "Noe G" at the time that the L'Etruria was first sighted, follows the testimony of one of appellants' witnesses, to-wit: that of Oscar Peuna, who was captain of the "Noe G", as shown by the testimony on page 25, line 23, viz:

"Q. Ask him who was the captain, not who was acting as captain, who was the captain at the time of the collision?

"A. I was.

"Q. How long had you been captain of that boat?

"A. A little over a month."

Further testimony sustaining this finding is that of Levero, p. 43, line 5, viz:

"Q. Which way were you looking?

"A. He says he was looking in every direction.

"By the Court: How came it that you did not see the L'Etruria first?

A. He says that the man on the wheel saw it first."

We call the Court's attention to the testimony of Peuna, page 26, line 25:

"Q. Who was the lookout?

"A. Antonio Levera.

"The Court: Where was he?

"A. Just one side of the man that was steering the boat.

"The Court: And he was standing near the wheel, what was he doing at the time?

"A. I was skinning fish, he was sounding the whistle and giving an alarm."

Levera is the man referred to several times in the evidence as the lookout, and we submit that this testimony of his shows conclusively that he was not attending to his duties as lookout, and that a finding of the District Court based on evidence should not be disturbed. There are many authorities holding to this effect:

The City of Naples, 69 Fed., 794;

The E. Luckenbach, 93 Fed., 841;

The Parsons, 48 Fed., 564;

The Thomas Melville, 37 Fed., 271.

In the case of *Cooper* vs. *The Saratoga,* 40 Fed., 509, the Court said:

> "The finding of the District Court on libel for damages for collision that both vessels were in fault will not be disturbed on appeal when no new proofs are taken and the evidence was conflicting, and the finding therein turned on the creditability of witnesses who were examined in the presence of the District Judge, though the testimony seems to warrant another conclusion."

In 1 C. J., p. 1351, sec 314, the rule is stated as follows:

> "The decision of a trial court upon questions of fact based upon conflicting testimony or the creditability of witnesses examined before the Judge, is entitled to great respect and will not be reversed unless manifestly contrary to the evidence, citing many cases."

We submit that the decision of the lower court should not be disturbed in this case, as there is certainly plenty of evidence on which the Court could base the findings objected to by appellants. However, taking their own contention, that is, that the Noe G sighted the L'Etruria when she was from 40 to 50 feet distant from the L'Etruria, there would have been no excuse for the "Noe G" not following the rules of the road which require that when boats are meeting end on, or nearly end on, each one shall go to starboard.

Fed. Stats., Ann. Vol. 2, p. 161, Art. XVIII.

There was, we contend, no such extremis as is contemplated by the cases or by the rule excusing error in extremis.

We call the Court's attention to the size of the boats in this collision. The evidence of Peopela in that regard was as follows, p. 34, line 28, viz:

> "*The Court*: How big is your ship, how long is it?
>
> "A. 38 feet.
>
> "*The Court*: How wide?
>
> "A. About 10 feet."

Further on page 6, line 24:

> "*The Court*: How long was the L'Etruria?
>
> "A. 38 feet."

The testimony with regard to the size of the boats was not questioned.

With boats of this size there would have been no difficulty in avoiding a collision had the "Noe G" gone to starboard, as under the rules of the road she was required to do. A shift of only a few feet in the course would have cleared the two boats and there would have been no collision. We submit that there was no necessity or reason for a departure from the rules.

In 123 U. S., p. 349, the Court said:

> "Departure from rules applies only when there is some special cause rendering a departure necessary to avoid immediate danger such as the nearness of shallow water, or a concealed rock, or the approach of a third vessel, or something of that kind."

The rule, as cited in 3d Enc. of the U. S. Sup. Court Reports, p. 889, Sec. 6, is as follows:

> "Rules of navigation are obligatory upon vessels approaching each other from the time the necessity of precaution begins and continues to be applicable so long as the means and opportunity to avoid the danger remain."
>
> *The Pacific,* 21 How., 372.

And it can hardly be questioned but what with boats of the size of this, had the "Noe G" gone to starboard, the collision could and would have been avoided.

The testimony shows, we believe, conclusively, that the L'Etruria did, on sighting the "Noe G", go to starboard. The testimony of J. H. Costa in this regard was as follows, p. 3, line 17:

> "Q. When you first saw the "Noe G" what did you do, if anything?
>
> "A. I tried to turn to the right, the righ hand side."

And on line 23:

> "Q. Ask him how much to the right he went, not out of his course, but how much to the right he went?
>
> "A. He says at least 15 feet."

And on page 4, line 4:

> "Q. Ask him if he put the wheel hard down and went to starboard as far as he could?

Line 8: A. Yes; he says he tried his best.

We call the Court's attention also to the Court's Exhibit A, and testimony of Noe Chappi with regard thereto, p. 54, line 10:

"Q. Were the ships going that way? (Handing witness Exhibit A.)

"A. He said they were going on their course, their boat comes right over and hit on the side of the bow or pretty low; that he did not see the hole; he said they were going just about as they stand now, but when I back up where the back was it would bring the bow to the left and they came right square on us at full speed. He says there was high water and rough water. There was heavy water and when I back up it brings the bow to the left, but they came with such high speed that the side of their boat hit pretty high on their boat on the left side."

This diagram, Exhibit A, corroborates the testimony of J. H. Costa, that he did go to starboard, and Chappi, in his answer, admits that the bow of the "Noe G" swung to port.

Costa is further corroborated by the way in which the Noe G struck the L'Etruria. The evidence shows, without question, that the "Noe G" struck the L'Etruria just forward of the chain plates. Had the two boats been meeting end on and held their course as claimed by appellants' witnesses, the "Noe G" would necessarily have struck the L'Etruria much nearer the bow. We believe that these facts, together with Chappi's testimony, fully corroborate the testimony of Costa in this regard.

We further call the Court's attention to the character of the testimony given by J. H. Costa. Mr. Costa frankly admits that he was not blowing his fog horn, as required by the rules of the road, neither does he

claim to have seen everything that happened in this collision, while, on the other hand, appellant's witnesses, all of them, seem to have seen everything that took place, if we are to rely on their testimony. They lay great stress on the speed of the "Noe G". We submit that if the "Noe G" had been making only the speed claimed, about three miles per hour, or a little less, in a sea as heavy as Mr. Chappi in his testimony just quoted claims that it was, the "Noe G" having but a very light cargo, the speed claimed would not have been sufficient to have given her steerageway.

We further submit that there was no necessity of the "Noe G" reducing her speed to three miles an hour under the conditions existing here, and that the L'Etruria was not negligent in running in the neighborhood of 7 miles per hour. The speed of a vessel in a fog depends entirely upon the conditions and surrounding circumstatnces, and we do not believe that a boat running 7 miles an hour off the coast of Baja California, on the high seas, as the evidence shows that these boats were running, where there is as little marine traffic as there is off this coast, would be negligent.

The rule with regard to vessels meeting end on is well stated in the America 92nd U. S. Reports, page 432, in which case the Court said:

> "Except in special cases the sailing ship is required to keep her course where a steamship is approaching in such a direction as to involve risk of collision but the rule is widely different if the two ships are under steam and they are meeting end on or nearly end on, so as to involve risk of col-

lision. The requirements in that event being that the helms of both ships shall be put to port so that each may pass on the port side of the other. Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution and neither can be excused from responsibility in case of omission, merely upon the ground that it was the duty of the other to have adopoted the corresponding precaution at the same time." And again, from the same case, "imperative obligation is imposed upon each to comply with the rule of navigation, nor will the neglect of one excuse the other in a case where each might have prevented the disaster, as the law requires both to adopt every necessary precaution."

We respectfully submit that even under appellant's contention as to the facts in this case, and to what the evidence shows, that they were nevertheless negligent, and that they were not justified in departing from the rule with regard to meeting vessels by reversing the "Noe G".

Appellant's contention that the respondents having admitted negligence on their part, that there was but little obligation on the part of the "Noe G" to comply with the rules of the road and to do everything in their power that an ordinary prudent seaman would do in handling his boat, is not well taken.

Quoting from 3d Ency. of U. S. Supreme Court Reports, page 890, sub. 8:

"The failure of one vessel to do what she should have done under the circumstances as required by the rules of navigation, does not excuse the other

from the duty of adopting every proper precaution to avoid collision."

The New York, 175, U. S., 187;

The Albert Dumois, 177 U. S., 240,

And many other cases there cited.

The rule applicable to this case, under the contention raised by the appellants, as to what the evidence shows, we believe is well stated in 7 Cyc., 312, Sec. 2, "where the error of one vessel has exposed her to the danger of collision which was consummated by the subsequent negligence of the other, the practice in the United States has been to divide the loss."

The Queen Elizabeth, 100 Fed., 874;

The Grover, 79 Fed., 378;

The Passic, 76 Fed., 460.

And many other cases there cited, which respondent respectfully submit would cover the case even under the contention of appellants that they did sight the L'Etruria when they were some 50 feet distant.

Appellants have attempted to show from the testimony that there was no one at the wheel of the L'Etruria. J. H. Costa's testimony on this point is positive, at p. 2, line 21:

"Q. What were you doing?

"A. He says he was at the rudder."

Same witness, page 4, line 25:

"Q. Ask him if he was keeping a close lookout ahead before the accident?

"A. Yes sir."

The evidence of appellant's witnesses in this regard is all negative, Peuna testifying, on page 21, line 16:

"Q. Did you see anybody on the L'Etruria at that time?

"A. I didn't see nobody."

That of Dosa Peopela, page 31, line 10, viz:

"Q. Did you see anybody on the L'Etruria when you first saw it?

"A. He says not before they came to a collision. The only thing he saw after they came together one came out from the cabin with a cigarette paper in his hand."

Antonio Levera, testified as follows, on page 41, line 24:

"Q. Was there anybody on the deck of the L'Etruria when you first saw it?

"A. No sir."

The evidence of Noe Chappi on that point was as follows, page 50, line 9:

"Q. Did you see anybody on the L'Etruria?

"A. Nobody on the deck."

Same witness, line 15:

"Q. Could you see whether there was anybody at the wheel of the L'Etruria from where you were?

"A. He said he could not see no one, he said they had a glass, but if there was he could see them.

"Q. If there was anyone there you could see them?

"A. Yes.

"Q. Was there any one there at the wheel when you looked up?

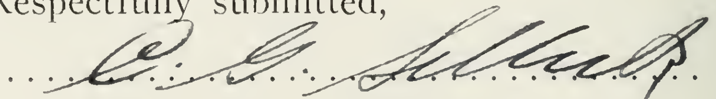
"A. No, he didn't see nobody."

We submit that the above testimony is entirely negative in its character and proves nothing to the Court.

The testimony of appellant's witnesses with regard to J. H. Costa coming from the cabin, or engine room, of the L'Etruria ,with a cigarette paper in his hand is an attempt, we presume, to show that he was not attending to his duties, and we do not believe is worthy of any consideration at all, as it would be strange indeed that if Costa had a cigarette paper in his hand prior to the collision, that he would still retain it after coming on deck after the collision and stranger still that each and every one of appellant's witnesses would have seen it in the excitement of the moment. We respectfully submit that the testimony of the three witnesses, Peopela, Levera and Chappi with regard to each and every incident connected with thits accident is so nearly identical as to arouse, by its character, grave suspicions as to when the witnesses first discovered that the facts were as testified to by them.

We therefore respectfully submit that the findings of the District Court are justified by the evidence, and that the decree entered by said Court should be by this Court confirmed and that respondent should have judgment for their costs herein expended, and for interest on the judgment rendered in the lower court at the rate of 7% per annum from the time of the rendition thereof.

Respectfully submitted,



Proctor for Respondents.